

Concrete Manufacturing Company and its Directors, Officers and Agents; James C. Bailey, John Barrett, Julian Davis, Aldine Walker, Charles Ledford; the Retirement Committee of Concrete Manufacturing Company of Dekalb Retirement Plan and Local Union 8, Georgia Bricklayers, Masons, Plasterers, International Union. Cases 10-CA-11213, 10-CA-11271, 10-CA-11380, and 10-CA-11580

July 8, 1982

**RULING ON MOTION AND SECOND
SUPPLEMENTAL DECISION AND
ORDER**

**BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND JENKINS**

On April 29, 1976, Administrative Law Judge John F. Corbley issued a Decision finding that Respondent Concrete Manufacturing Company of DeKalb and Respondent Concrete Manufacturing Company, a single employer, hereinafter referred to as Respondent Company, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, by discriminatorily discharging employees Calvin Jones and Alfred Lee Shealey. The Administrative Law Judge issued a recommended Order requiring Respondent Company to reinstate the discriminatees and make them whole for any loss of earnings they may have suffered by reason of the discrimination practiced against them. As no exceptions were filed to the Administrative Law Judge's findings or recommendations, the Board, on June 10, 1976, summarily adopted the Administrative Law Judge's Decision and Order in its entirety.¹ Thereafter, on January 30, 1978, the United States Court of Appeals for the Fifth Circuit enforced the Board's Decision and Order.² On June 29, 1979, following issuance of a backpay specification and notice of hearing by the Regional Director for Region 10, Administrative Law Judge Robert C. Batson issued a Supplemental Decision which recommended that Respondent Company be ordered to pay certain backpay sums to the two discriminatees, and further recommended that the Board reserve the determination as to whether any individual might be personally liable to satisfy the backpay award pending court enforcement of the Supplemental Decision and a plea of Respondent Company and its officers and agents of inability to comply therewith due to a lack of assets to satisfy the award. On September 11, 1979, the Board adopted the Supplemental Decision and recom-

mended Order in its entirety.³ Subsequently, the United States Court of Appeals for the Fifth Circuit issued an order enforcing the Board's Supplemental Decision.⁴ On August 31, 1981, counsel for the General Counsel filed directly with the Board a "Motion for Determination of Personal Liability" alleging that Respondent James C. Bailey, hereinafter referred to as Respondent Bailey, and Respondent John Barrett, hereinafter referred to as Respondent Barrett, wrongfully converted assets of Respondent Company to their personal use. Counsel for the General Counsel requested that the Board find that Respondents Bailey and Barrett were personally liable to satisfy the court-enforced backpay award. Thereafter, on November 6, 1981, the Board issued a notice that the parties show cause why the General Counsel's "Motion for Determination of Personal Liability" should not be granted. Only Respondent Bailey filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, including Respondent Bailey's response to the Notice To Show Cause, the Board makes the following findings:

The sole issue in this proceeding is whether Respondent Bailey and Respondent Barrett are personally liable to satisfy the Board's court-enforced backpay order. For the reasons set forth below, we find, in agreement with the General Counsel, that those individual Respondents are personally responsible to satisfy the backpay award.⁵ Accordingly, we shall grant the General Counsel's motion.

In early March 1976, following the unfair labor practice hearing before Administrative Law Judge Corbley, but before his Decision issued, the Citizens and Southern National Bank, hereinafter referred to as Citizens Bank, instituted foreclosure proceedings against Respondent Company. Shortly thereafter, on April 6, 1976, the physical assets of Respondent Company were sold by Citizens Bank to satisfy Respondent Company's indebtedness.

¹ 244 NLRB 975.

² *N.L.R.B. v. Concrete Manufacturing Company of DeKalb*, No. 80-7634 (5th Cir. 1980).

³ We find no merit to Respondent Bailey's assertion that the Board is without jurisdiction to determine the issues raised by the instant motion. In *N.L.R.B. v. C.C.C. Associates, Inc., et al.*, 306 F.2d 534 (2d Cir. 1962), the court clearly upheld the authority of the Board to conduct post-decisional inquiries relating to questions of derivative liability. That case is squarely applicable herein. See also *Riley Aeronautics Corporation, et al.*, 178 NLRB 495 (1969). Moreover, our first Supplemental Decision in this case specifically reserved jurisdiction to consider the issue of personal liability at a later date. Under these circumstances, we find Respondent Bailey's challenge to our jurisdiction to be groundless.

⁴ Not reported in bound volumes of Board Decisions.

⁵ *N.L.R.B. v. Concrete Manufacturing Company of DeKalb*, No. 77-3265 (5th Cir. 1978).

Since that date, Respondent Company has been defunct and, except as noted below, without assets to satisfy the Board's backpay award to the discriminatees.

At the time of the foreclosure, Respondent Company had in existence a retirement plan having assets in excess of \$30,000. The retirement plan, created in 1963, was totally funded by Respondent Company for the benefit of certain of its employees. Approximately 5 years after the retirement plan was created, Respondent Company entered into a trust agreement with a local bank wherein that bank became trustee of the retirement plan. In 1972, Citizens Bank assumed the trust agreement and at all times thereafter functioned as trustee. Following foreclosure, Citizens Bank, as trustee of the retirement plan, disbursed to all vested participants in the retirement plan their *pro rata* shares of the corpus of the trust. After such distribution, there remained in the trust approximately \$17,000 which had accrued by virtue of contributions made on behalf of employees whose benefits had not vested. It is this \$17,000 "surplus" which the General Counsel contends are assets of Respondent Company which can be reached to satisfy the backpay liability. However, on May 12, 1977, Respondent Company's board of directors, consisting of Respondent Bailey, Respondent Barrett, and Respondent Bailey's wife, authorized and directed the chairman of Respondent Company's retirement committee⁶ to cause the distribution of the retirement plan surplus to the plan's vested beneficiaries. The following day, Respondent Bailey, as chairman of the retirement committee, instructed Citizens Bank, as trustee, to distribute the retirement plan surplus in accordance with the board of directors' instruction. On or about June 1, 1977, trustee Citizens Bank filed an action in interpleader in the United States District Court for the Northern District of Georgia⁷ seeking that the named defendants interplead and settle among themselves their rights to the retirement plan surplus. The complaint named the following defendants: Respondent Company; the retirement committee; and Respondent Bailey, Respondent Barrett, Julian Davis, Aldine Walker, and Charles Ledford, as beneficiaries of the retirement plan. On July 11, 1977, all of the named defendants filed a joint answer and statement of claims in which Respondent Company and the retirement committee disclaimed all interests in the surplus moneys, and the individual defendants called for distribution among themselves. On the

same date, the court granted the trustee's motion for judgment on the pleadings and, since all defendants agreed upon the manner in which the surplus was to be distributed, ordered that the surplus be distributed as follows: to Respondent Bailey, \$12,651.37; to Respondent Barrett, \$1,009.11; to Julian Davis, \$151.71; to Aldine Walker, \$1,680.71; and to Charles Ledford, \$1,522.87.

Based on the foregoing facts, the General Counsel contends that the acts of Respondents Bailey and Barrett, taken at a time when those Respondents had actual knowledge of the Board's Order requiring backpay be paid to discriminatees Jones and Shealey, constituted wrongful depletion of assets belonging to Respondent Company for the purpose of defeating that backpay award. We agree.

Initially, we find that the moneys constituting the retirement plan "surplus" are assets of Respondent Company. Article IX of the retirement plan states, *inter alia*, that: "If the assets of the Plan are more than sufficient to provide 100% of the benefits for all priority Classes, the remainder shall revert to the Company."⁸ Respondent Bailey concedes, as he must, that this provision indicates that the approximately \$17,000 surplus in its retirement plan is an asset of Respondent Company, but contends that article X of the trust agreement is in direct conflict with that provision. Respondent Bailey argues that the trust agreement, written some years after the retirement plan, must control over the retirement plan itself. We find it unnecessary to pass on this contention since, in our view, the trust agreement is not in direct conflict with the retirement plan. Article X of the trust agreement provides as follows:

The Company reserves the right at any time and from time to time (a) to modify or amend . . . any or all of the provisions of this Agreement, or (b) to terminate this Agreement upon sixty (60) days prior notice in writing to the Trustee; provided, however, that the Company shall certify in writing to the Trustee that such termination, modification, or amendment *prior to the satisfaction of all liabilities with respect to Participants* . . . does not permit any part of the corpus or income of the Fund to be used for, or diverted to, purposes other than the exclusive benefit of the Participant. . . . In the event of termination of the Trust, all cash, securities and other property then constituting the Fund, less any amounts constituting charges and expenses payable from the Fund, shall be paid over or delivered by the Trustee

⁶ The retirement committee consisted of Respondent Bailey, Respondent Barrett, and Respondent Bailey's wife. Respondent Bailey was chairman of the committee.

⁷ *Citizens and Southern National Bank. Trustee v. Concrete Manufacturing Company of DeKalb, et al.*, No. C77-903A (N.D. Ga. 1977).

⁸ Art. IX, "Amendment and Termination," sec. 2, p. 24.

to or on order of the Committee. [Emphasis supplied.]

The quoted language, hardly an exemplar of clarity in drafting, does not rebut the clear language of article IX of the retirement plan, set forth above. Viewed in the light most favorable to Respondent Bailey, the quoted language is, at best, ambiguous. At worst, the quoted language is fully consistent with the retirement plan's provision that moneys remaining in the trust fund after all vested benefits have been paid revert to Respondent Company. Accordingly, we find that the approximately \$17,000 remaining in the trust fund after satisfaction of all vested benefits was an asset of Respondent Company reachable by the Board or the courts to satisfy any liabilities of Respondent Company, including a backpay award.

Having found that the retirement plan "surplus" was an asset of Respondent Company, there remains for consideration the issue of whether, in view of the subsequent distribution of that surplus to the beneficiaries of the retirement plan, the particular facts of this case warrant the extraordinary action of the Board "piercing the corporate veil" and imposing personal liability on the individual Respondents for the backpay awarded the discriminatees. In deciding this issue, we are guided by the principles set forth in *Chef Nathan Sez Eat Here, Inc., et al.*, 201 NLRB 343 (1973), and *Riley Aeronautics Corporation, et al.*, 178 NLRB 495.⁹ In *Riley*, the Board adopted an Administrative Law Judge's statement of the applicable law, as follows:

[T]he corporate veil will be pierced whenever it is employed to perpetrate fraud, evade existing obligations, or circumvent a statute. . . . Thus, in the field of labor relations, the courts and Board have looked beyond organizational form where an individual or corporate employer was no more than an *alter ego* or a "disguised continuance of the old employer" . . . or was in active concert of participation in a scheme or plan of evasion . . . or siphoned off assets for the purpose of rendering insolvent and frustrating a monetary obligation such as backpay . . . or so integrated or intermingled his assets and affairs that "no distinct corporate lines are maintained." [*Id.* at 501.]

Applying these principles to the instant case, we find that Respondent Bailey and Respondent Barrett are personally liable for the backpay due the discriminatees. We do not make this determination of personal liability lightly, but rather believe that it is mandated by the particular facts of this case.

⁹ See also *Metropolitan Bureau of Investigation Inc., et al.*, 246 NLRB 544, fn. 1 (1979).

Respondents Bailey and Barrett, together with Respondent Bailey's wife, composed both the board of directors and the retirement committee of Respondent Company. Respondent Bailey was president of both corporate entities composing Respondent Company. Respondent Barrett was plant manager of Respondent Company's DeKalb facility. As recited above, the Board's original Decision and Order, directing that Respondent Company make whole the discriminatees for their lost wages, issued on June 10, 1976. Over 11 months later, on May 12, 1977, Respondents Bailey and Barrett joined in a unanimous consent of the board of directors of Respondent Company authorizing and directing Respondent Bailey, as chairman of the retirement committee, to cause the distribution of the retirement plan "surplus" for the personal use of the retirement plan's beneficiaries, including Respondents Bailey and Barrett. Obviously, then, the board of directors' action occurred at a time when it had actual knowledge of the Board's Decision providing for backpay to the discriminatees.¹⁰ By taking the action they did and converting assets of Respondent Company to their own personal use, Respondent Bailey and Respondent Barrett acted to frustrate this Board's directions by rendering Respondent Company insolvent and thus incapable of satisfying the Board-ordered backpay relief.¹¹ We find that this action warrants "piercing the corporate veil," and imposing personal liability on Respondents Bailey and Barrett under the principles set forth in *Chef Nathan Sez Eat Here, supra*, and *Riley Aeronautics, supra*.¹²

ORDER

It is hereby ordered that the General Counsel's "Motion for Determination of Personal Liability" be, and it hereby is, granted.

IT IS FURTHER ORDERED that Respondent James C. Bailey and Respondent John Barrett shall, to the extent indicated herein, be personally liable to satisfy the backpay liability of Respondent Concrete

¹⁰ Indeed, Respondent Bailey admitted that he had knowledge of the Board's Order shortly after it issued and well prior to the unanimous action of the board of directors.

¹¹ Our decision to impose personal liability is not affected by the fact that the distribution of Respondent Company's assets was carried out under the color of a court order, since the order noted on its face that it was entered by consent of the parties.

¹² In view of the sum certain originally available to satisfy our backpay award, the parameters of the extent to which Respondent Bailey and Respondent Barrett are liable to satisfy that award are limited to the sums received by them for their personal use, plus interest. Thus, Respondent Barrett's liability shall be limited to \$1,009.11 plus interest, and that of Respondent Bailey shall be limited to \$12,651.37 plus interest. In order to effectuate most fully the purposes and policies of the Act, we direct that such liability shall be joint and several in nature. Interest on the sums received by Respondent Bailey and Respondent Barrett shall be computed in the same manner as interest on the backpay owed the discriminatees.

Manufacturing Company as set forth in the Board's Supplemental Decision and Order reported at 244 NLRB 975 (1979).